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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

Nos. 73-1966 and 73-1971

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *Appellants*

v.

STUDENTS CHALLENGING REGULATORY AGENCY PROCEDURES (S.C.R.A.P.) ET AL., *Appellees*

ABERDEEN AND ROCKFISH RAILROAD COMPANY, ET AL., *Appellants*

v.

STUDENTS CHALLENGING REGULATORY AGENCY PROCEDURES (S.C.R.A.P.) ET AL., *Appellees*

On Appeal from the United States District Court for the District of Columbia

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BRIEF FOR APPELLEES NATIONAL ASSOCIATION OF RECYCLING INDUSTRIES, INC., COMMERCIAL METALS CO., I. V. SUTPHIN CO. AND FRANKEL BROS. & CO. INC.

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OPINIONS BELOW

The opinion of the three-judge district court is reported at 371 F. Supp. 1291. The Interstate Commerce Commission's opinion and order issued October 4, 1972 is reported at 341 I.C.C. 290. The Commission's final environmental impact statement in *Ex Parte 281* is reported at 346 I.C.C. 88. The Commission's order of May 2, 1973 is not reported, but can be found in Appendix E to the Government's Jurisdictional Statement in this case.

JURISDICTION

Appellees contend this Court has no jurisdiction over the two direct appeals here involved under the provisions of 28 U.S.C. § 1253, and they urge the Court to reconsider appellees' earlier motion to dismiss for lack of direct appellate jurisdiction.

QUESTIONS PRESENTED

1. Whether appellants are entitled, under 28 U.S.C. § 1253, to maintain a direct appeal to this Court from a district court order which refused to grant injunctive relief and where no appeals have been taken by those who were denied injunctive relief.

2. Whether the district court had jurisdiction to review orders issued by the Interstate Commerce Commission under 49 U.S.C. § 15(7) in response to complaints alleging that said orders violated provisions of another federal statute, the National Environmental Policy Act (NEPA), 42 U.S.C. § 4331 et seq.

3. Whether the Interstate Commerce Commission, which has an established record of adamantly refusing

to comply with the plain requirements of Section 102(2)(C) of the National Environmental Policy Act (NEPA), 42 U.S.C. § 4332(2)(C), may lawfully ignore those statutory directives by arbitrarily failing and refusing to prepare any acceptable or sustainable Environmental Impact Statement *prior* to the rendition of its *final* decision and order in a nationwide freight rate increase proceeding, wherein it expressly approved another across-the-board, unreasonable, discriminatory, pyramidic increase in transportation rates for recyclable wastepaper, textiles and scrap metal.

4. Whether the Interstate Commerce Commission may lawfully defeat and circumvent the plain requirements of Section 102(2)(C) of NEPA by waiting until several months *after* it has already rendered a final decision and order in a nationwide freight rate increase proceeding, wherein it expressly approved another across-the-board increase in transportation rates for recyclable commodities, to prepare *for the first time,* a *post-mortem* Environmental Impact Statement, the sole purpose of which is to rationalize, *nunc pro tunc,* the rate increase theretofore approved seven months before.

5. Whether the Interstate Commerce Commission, which is obliged by Section 15(7) of the Interstate Commerce Act, 49 U.S.C. § 15(7), to hold meaningful hearings to determine the *"lawfulness"* of proposed rate increases, may properly issue a final order approving such rate increases and only *thereafter* consider the *"lawfulness"* of such approved increases under the National Environmental Policy Act in *post-decision* proceedings that flatly deny the right to any hearing on the *new issues* thus belatedly raised.

6. Whether in a case of this nature where the Commission has constantly exhibited hostility to the requirements of the National Environmental Policy Act, the district court properly exercised its judicial power to review not only the *form* of the Commission's alleged, belated compliance with NEPA, but the *substance* of that alleged compliance as well; and where the court found the Commission's alleged compliance to be seriously inadequate or capricious, was it proper for the court to remand the case to the Commission for further administrative proceedings consistent with the court's decree.

COUNTER-STATEMENT OF THE CASE

Appellee National Association of Recycling Industries, Inc. (NARI) is the trade association for the wastepaper, textile and non-ferrous metals recycling industries. NARI intervened as a plaintiff in the case below to represent the interests of its 700 members, all of whom engage in the collection, processing or manufacturing utilization of the aforementioned recyclable commodities.

Appellees Commercial Metals Co. of Dallas, Texas, I.V. Sutphin Co. of Cincinnati, Ohio, and Frankel Bros. & Co. Inc. of Rochester, New York also intervened as plaintiffs in the district court. Each is engaged in the recycling of solid waste materials which, if not so utilized, would have been burned, buried or otherwise disposed at public expense, with obvious adverse effects on the environment; and all, of course, use the nation's railroads to ship recyclable commodities.

Recyclable wastepaper utilized by NARI's membership competes with virgin pulpwood or woodpulp in the nation's paper and boxboard manufacturing industries.

Similarly, recyclable non-ferrous metals (aluminum, copper, lead, zinc, etc.) and virgin non-ferrous ores and concentrates are competing raw materials in metal manufacturing, while recyclable textiles compete with virgin fibers throughout the textile manufacturing industry. By and large, these competing virgin and recyclable commodities are interchangeable in manufacturing processes, and where they are not completely substitutable, manufacturers use one as a supplement for the other to produce various types and grades of goods and products.

Almost without exception, the virgin commodities in each of the industries mentioned above are able to demand raw material prices far in excess of those manufacturers are willing to pay for competing recyclable counterparts. Pulpwood or woodpulp, for example, is typically sold at prices far higher that those simultaneously paid for competing wastepaper, and the same situation applies to competing sales of virgin ores and recyclable scrap, and those involving virgin and recyclable textiles.

Thus, from the very outset, one is tempted automatically to conclude that certainly the high-priced virgin commodities must be paying higher transportation rates than those exacted for the movement of competing, low-priced recyclable commodities. Unfortunately, however, the record in this case demonstrates that this is *not* true. On the contrary, the record before this Court shows that the railroad freight rate system administered by the Interstate Commerce Commission, in partnership with the nation's railroads, has created an abominable, incongruous situation where environmentally-charged, low-priced recyclable commodities have been compelled, for a long period of years, to pay

rates far higher than those charged for the transportation of competing virgin commodities, and that the situation is getting worse with each passing year. In this connection, the record shows:[1]

Pulp v. *Wastepaper*

(1) In 1959, the *average nationwide rates* charged by the railroads for the transportation of competing pulp and wastepaper were:

Pulp	17.4¢ per cwt.
Wastepaper	31.3¢ per cwt.
Net Difference:	13.9¢ per cwt. in favor of virgin pulp.

(2) By 1971, as a result of % rate increases sought by the railroads and approved by the Commission in a series of *Ex Parte* proceedings, the *average nationwide rates* for the transportation of these two commodities had changed as follows:

Pulp	24.4¢ per cwt.
Wastepaper	43.0¢ per cwt.
Net Difference:	18.6¢ per cwt. in favor of virgin pulp.

(3) Since 1971, the railroads have continued to seek, and the Commission has either approved or is in the process of studying, the following additional % rate increases for the transportation of these competing commodities (in some cases, however, pulp was expressly exempted from any increase whatsoever):

[1] See Commission's Environmental Impact Statement, *Ex Parte 281*, App. 146, 147.

Rate Increase Case	Year	% Increase
Ex Parte 281	1972	2.5% surcharge, plus 3%
Ex Parte 295, Sub. 1	1973	3%
Ex Parte 299	1974	2.8%
Ex Parte 303	1974	3.3% plus 10%[2]
Ex Parte 310	1975	7%[3]

When and if the two last mentioned % increases go into effect as have the others mentioned above, the competitive transportation situation for competing pulp and wastepaper will be as follows, on an average nationwide rate basis:

Pulp	30¢ per cwt.
Wastepaper	58¢ per cwt.
Net Difference:	28¢ per cwt. in favor of virgin pulp.

Non-Ferrous Ores v. *Metal Scrap*

The picture is very much the same for competing non-ferrous ores or concentrates and metal scrap. The record before the Court demonstrates that—

(i) In 1959, the virgin ores enjoyed a favorable 13.3¢ per cwt. average nationwide rate differential;

(ii) By 1971, the differential in favor of the virgin commodity had grown to 17.7¢ per cwt.; and

(iii) In 1975, the *differential* in favor of the virgin commodity will expand to 34¢ per cwt., when

[2] The Commission authorized the railroads to put the 10% increase into effect by individual tariff filings, and the railroads, as a group, are now proceeding to put the increase into effect.

[3] The railroads' application is now before the Commission for action.

and if the *Ex Parte 305* and *310* increases are put into effect as aforesaid.[4]

The severe adverse impact of these constantly-expanding rate disparities on the ability of recyclable commodities to compete with their virgin competitors in the marketplace is not fully understood until one realizes, as conceded by the Government in its brief,[5] that (a) transportation costs often far exceed the price paid for low-value recyclable wastepaper, textiles and scrap, and (b) manufacturing plants are traditionally located much nearer to the mines and forests where virgin commodities are found than to the large metropolitan areas where wastepaper, recyclable cans and textiles are collected from the solid waste stream—meaning, of course, that longer travel distances necessarily impose greater transportation costs, at disproportionately higher rates, on the competing recyclable materials.

This explains in large part, therefore, why our national recycling rates have actually declined in recent years and are threatened with further deterioration. Statistics compiled by the Environmental Protection Agency and made available to the Commission demonstrate that the following national recycling rates *inter alia* are already dangerously low—

Commodities	Current Recycling Rates
Textiles	4%
Zinc	13%
Aluminum	18%
Wastepaper	19%

[4] Similar inexplicable rate disparities exist in favor of virgin textile fibers, which, as aforesaid, compete with recyclable textile materials.

[5] See Government's brief, pg. 30.

In wastepaper, for example, the EPA statistics show that, as recently as 1952, our national recycling rate was 27%, and that in other countries such as Japan, the present recycling rate is far higher. Moreover, while our recycling rates have been declining, the national production of solid waste materials has been dramatically increasing. In textiles, EPA warns that while the recycling rate is an almost meaningless 4%, the production of textiles in this country will increase from 10 billion pounds in 1970 to 15 billion pounds in 1980. The same statistics, which were available to the Commission in this case, demonstrate that, in paper, the national production in 1969 was 58.5 million tons, less than 20% of which was recycled, leaving more than 42 million tons to be burned or buried. By 1980, EPA and the paper industry itself project that the consumption of paper in the United States will grow to 80 million tons a year, and that unless the current recycling rate of only 19% is significantly increased, rather than decreased, our nation is in danger of being buried in its own undisposed, unrecycled trash.[6]

Simultaneously, of course, other agencies of the Federal Government have repeatedly warned the Congress and the President that our nation is also in danger of exhausting its supplies of precious ores and pulp in the years ahead, and that unless we reduce our voracious industrial consumption of these virgin materials, we will be forced to depend on foreign imports, particul-

[6] See also 1970 Report to Congress, President's Council on Environmental Quality, pgs. 105-108; June 1, 1972 Report to the President, Citizens' Advisory Committee on Environmental Quality; March, 1973 Report to EPA by National League of Cities-U.S. Conference of Mayors, entitled *"Cities and the Nation's Disposal Crisis."*

arly in metals—and, of course, increased dependence on imports submits the United States to new foreign sources of cartel pricing and commodity embargoes, as well as serious damage to our already strained balance of payments position.[7] In 1973, the Director of EPA's Office of Solid Waste Management described the situation in pulp, in sworn testimony as follows:[8]

> "The U.S. Forest Service has predicted that by the year 2,000 a shortage of 20 billion board feet of softwood saw timber will exist. . . . The shortage would reach 10 billion board feet by 1980. 1 million tons of wastepaper recycled saves 1.4 billion board feet of timber, which could to some extent be used to offset this projected timber shortage. . . .
>
> "The land commitment required to produce an annual timber growth sufficient to yield 1 million tons of pulp per year is roughly 2.5 million acres.
>
> "Each ton of paper recycled would allow land to be used for other purposes, such as lumber production or for a non-forestry function, such as recreation."

---

[7] See 1970 Report to Congress, President's Council on Environmental Quality, pg. 158; June 1973 Final Report to the President and the Congress, The National Commission on Materials Policy; 1973 Report to Congress, Environmental Protection Agency; March, 1973 Report to EPA by National League of Cities-U.S. Conference of Mayors, entitled "*Cities and the Nation's Disposal Crisis*"; April 5, 1973 Report of The Council of State Governments, entitled "*The States' Roles in Solid Waste Management*"; May 21, 1973 issue of *Newsweek* magazine, which stated: "As Government officials and environmentalists search for ways to cut the drain on the nation's natural resources, their thoughts turn increasingly to recycling."

[8] Federal Maritime Commission Docket 72-35, *Pacific Westbound Conference—Waste Paper and Woodpulp Investigation*, Record, 654-655.

Similarly, in metals, the U.S. Geological Survey, in a publication entitled "United States Mineral Resources" (U.S. Geological Survey Paper No. 820, 1973), geographically illustrated the dangerous tendency of growing U.S. dependence on foreign basic raw materials. In summary, the Survey reported that, of the 13 basic industrial raw materials required, the U.S. *in 1950* was dependent on imports for more than ½ of its supplies of *four—aluminum, manganese, nickel* and *tin; by 1970,* the list had increased to *six,* as *zinc* and *chromium* were added; *by 1985,* the U.S. will depend on imports for more than ½ of its supplies of *nine* basic raw materials—as *lead* and *tungsten* are added to the list; and by the *end of the century,* our country will depend on foreign sources for more than ½ of its supply of *each of the 13 raw materials* except phosphate. (See also Geological Survey Circular No. 698, entitled "Mineral Resources: Potentials and Problems")

Faced with these gloomy predictions, the Deputy Assistant Secretary of the Interior for Mineral Resources, described the ultimate financial implications for the United States in this manner:[9]

> "In the case of metals, the forecast indicates a continuing rapid rise in demand, but at the same time, a very small increase in supply from domestic sources.
>
> "This results in a forecast that, in metals, reliance on foreign sources will increase from Five Billion in 1970 to an annual level of Sixteen Billion Dollars by 1985 and to a staggering Thirty-Six Billion Dollars by the year 2000.
>
> "And that is what can happen unless something is done."

---

[9] "Minerals In The Future," June 16, 1973 by Dep. Asst. Secretary of the Interior Rigg; See also May 21, 1973 issue of Newsweek Magazine.

Finally, in the vitally important energy area, the Atomic Energy Commission and EPA conducted separate studies which proved that industrial utilization of recyclable commodities in place of competing virgin materials results in vast savings of precious oil and gas. In a report entitled "Energy In Solid Waste," issued in early 1975, the President's Advisory Committee on Environmental Quality stated, at page 5:

> "From an energy conservation point of view, the . . . recycling of paper requires *less than one-third* of the fossil fuel energy needed to make paper from primary sources. If, as EPA's Second Report to Congress indicates, it is technically possible to recover half of the 70% of the mixed wastepaper, the recycling of this portion (13.7 million tons) plus the 11.7 million tons of the easily separable items could mean a fossil fuel energy saving equivalent to *2.4 billion gallons of gasoline per year.* This exceeds the fuel energy equivalent of 2.2 billion gallons of gasoline that could be produced annually by burning the same amount of trash paper. . . . Thus, the recycling of paper—as opposed to burning—would produce *a net energy benefit of about 200 million gallons of gasoline, enough to drive 270,000 cars 10,000 miles a year at a rate of 13.3 miles per gallon.*" (Italics supplied.)

In the metals area, the President's Committee reported, at page 7:

> ". . . recycled aluminum requires *less* than 3% of the energy needed to produce aluminum from bauxite ore. Recycled steel requires less than half the energy needed to produce steel from virgin ore. When it is assumed that about 70% of the aluminum and 90% of the steel in the 1971 National Trash Can could be recovered, these factors translate to a potential recycling energy equivalent saving of *226.5 trillion BTU's or 1.8 billion gallons of gasoline—enough to make nearly 7 million one-way car trips per year from New York to San Francisco on the basis of 13.3 miles per gallon.*" (Italics supplied.)

Considering all of these divergent factors of urgent national interest, it is hardly surprising that there has been a mounting clamor from all levels of Federal, State, and local government calling upon the Interstate Commerce Commission immediately to eliminate the outrageous disparity in freight rates for the transportation of recyclable commodities—and in each case, the Commission has been urged *not* to license any further % rate increases until the basic disparities hereinabove described have been eliminated. In its June, 1972 Report to the President, his Citizens' Advisory Committee on Environmental Quality, chaired by Laurence Rockefeller, stated, at pages 33-41:

> "Solid waste problems have become staggering. There are few environmentally effective ways to handle it. In a very short time urban areas will have run out of landfill sites. . . . Large-scale, low-cost incineration which does not contribute to air pollution is not yet available. . . .
>
> "*Freight Rates*
>
> "Traditionally, freight rates established by the Interstate Commerce Commission (ICC) for the most part discourage recycling. . . . (T)hey work against recovery of solid waste. . . .
>
> ". . . In our 1971 Report, the Committee recommended that ICC initiate comprehensive remedial action as soon as possible. We urge prompt further action."

Similarly, in its March, 1973 report entitled "Cities and the Nation's Disposal Crisis," the U.S. Conference of Mayors states (at page 1-21):

> "The disposal of wastes and the conservation of resources are two of the greatest problems to be understood and solved by this nation in the latter third of the century. . . .
>
> "Recycling and resource recovery as a solution is potentially the most environmentally cost effective and responsible approach. . . .
>
> "*Discriminatory freight rates are . . . contributing to a disadvantaged marketing position for recycled solid wastes. . . . Before secondary materials handlers can buy and sell recycled municipal wastes in a competitive market and before cities can attempt rail haul of wastes to distant sites for major land reclamation efforts, rate adjustments must be made. Since regulatory rates of the Interstate Commerce Commission have exacerbated the unfavorable economics of waste transport, federal action is required.*"

An almost identical position was expressed by The Council of State Governments in its April 5, 1973 Report entitled "The States' Roles In Solid Waste Management," at pages 41-44, where it is stated:

> "*Freight Rates*
>
> "A substantial difference in freight rates charged by rail carriers exists between virgin raw materials and recycled materials. . . . Therefore, freight rates established by the Interstate Commerce Commission should be set in a manner that does not give an advantage to either type of material through set tariff charges."

In June, 1973, The National Commission on Materials Policy, established by Congress and appointed by

the President under Title II of the Resource Recovery Act of 1970, P.L. 91-512, issued its final report to the President and the Congress, in which it too concluded, at pages 4D17, 18:

> "Rail freight rates are an important factor in the economics of recycling. Transportation costs are a large percentage of the total cost of using some secondary materials. Often they determine whether recycling can be profitable. Certain railroad freight rates appear to discriminate against secondary materials in favor of virgin materials. . . .
>
> "Cost data available . . . indicate obvious discrimination against scrap. *Two different studies, one published by the ICC and the other by the Department of Transportation, show that shippers of scrap materials pay freight rates that more than cover the full costs of transportation service received. Shippers of virgin materials often do not.*
>
> "*We recommend that . . . the Federal Government take the necessary steps to correct the existing freight rate differentials between secondary and primary materials.*"

More particularly, in *Ex Parte 281*, the case now before this Court, the President's Council on Environmental Quality, the Environmental Protection Agency, the Departments of Commerce and Interior and the General Services Administration all appeared to urge the Interstate Commerce Commission not to grant any further % increases in the existing rates for recyclable commodities until the Commission first eliminates the basic disparities in rates for competing virgin and recyclable materials. Indeed, these agencies and appellee NARI have been appearing in various ICC *Ex Parte* rate increase proceedings since 1968 to assert

that same position, but the Commission repeatedly turned a deaf ear and continued, as hereinabove demonstrated, to raise the rates on recyclables in such a manner that the net disparities in rates for competing virgin and recyclable commodities have automatically been exacerbated and expanded beyond the limits of reasonable explanation or understanding.

In 1969, while the Commission was proceeding in the manner just described, Congress passed the National Environmental Policy Act (42 U.S.C. § 4321 et seq.). That statute states, at 42 U.S.C. § 4331(b):

> "(b) In order to carry out the policy set forth in this chapter, it is the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may— . . . .
>
> (6) enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources."

Section 102 of NEPA (42 U.S.C. § 4332) thereupon provides:

> "The Congress authorizes and directs that, to the fullest extent possible:
>
> "(1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, and
>
> "(2) all agencies of the Federal Government shall— . . .
>
> "(C) include in every recommendation or report on . . . major Federal actions sig-

> nificantly affecting the quality of the human environment, a detailed statement by the responsible official on—
>
> (i) the environmental impact of the proposed action,
>
> (ii) any adverse, environmental effects which cannot be avoided should the proposal be implemented,
>
> (iii) alternatives to the proposed action,
>
> (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
>
> (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.
>
> "Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to the environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public . . . and shall accompany the proposal through the existing agency review processes."

Accordingly, when the railroads filed an application in late 1971 in *Ex Parte 281—Increased Freight Rates and Charges, 1972* requesting permission to add another 2.5% surcharge to the existing freight rates for recyclable commodities, the original plaintiffs in

this case (S.C.R.A.P.) demanded that the Commission fully comply with the mandates of the new statute NEPA before any definitive action was taken on the railroads' latest % rate increase proposal. The Commission, however, in line with the myopic attitude toward environmental issues it had repeatedly exhibited prior to the enactment of NEPA, failed to prepare any *draft* or *final* Environmental Impact Statement as required by Section 102(2)(C)(2), and on February 1, 1972, it issued a blunt order approving the proposed 2.5% surcharge, in which it simply concluded (See 346 F. Supp. 193):

> "... the involved general increase will have *no* significant adverse effect on ... the quality of the human environment within the meaning of the Environmental Policy Act of 1949."

The railroads thereafter filed a further request in *Ex Parte 281* for another permanent % rate increase of 4.1%, such increase to become effective no earlier than May 1, 1972. In the meantime, S.C.R.A.P. and others were engaged in negotiations with the Commission in an effort to secure compliance with NEPA. On February 3, 1972, S.C.R.A.P. and ICC entered into a "Memorandum of Understanding" whereby S.C.R.A.P. agreed *not* to seek an injunction against the Commission's February 1 order in exchange for ICC's *promise* to "*issue a draft environmental statement in accordance with the requirements of NEPA and ... otherwise to comply with the requirements of the Act in Ex Parte 281.*" (See 346 F. Supp. 193.)

In response to this pressure from S.C.R.A.P. and other appellees in this case, the Commission did issue a six-page document called a "Draft Environmental

Impact Statement" on March 6, 1972. The Nature of this draft statement, upon which the Commission *now* relies so heavily in the Government's brief before this Court, was described by the district court, as follows in its July 10, 1972 decision in this case (See 346 F. Supp. 193, 194):

> "The Commission has never adequately explained why it bothered to prepare a draft statement premised on facts it knew to be *false,* and the reason why the ICC finds itself with the resources necessary to prepare draft statements on *false hypotheses* while it is assertedly without resources to prepare impact statements as required by NEPA based on *real facts* remains one of the enduring mysteries of this case."

In any event, the extremely brief draft statement prepared by the Commission in March, 1972 aimlessly concluded (346 F. Supp. 194):

> "... it is impossible at this point in the investigation to assess with any certainty the environmental impact of assessment of, or failure to assess, a surcharge on various recyclable commodities."

The Commission thus allowed the 2.5% surcharge to remain in effect *allegedly without any knowledge of the impact that action might have on the recyclables involved,* but it did solemnly promise the district court a detailed final impact statement would be filed before a final order was issued regarding the proposed permanent rate increases[10]—*a promise it later broke, as hereinbelow set forth.*

At this point in the *Ex Parte 281* proceedings, appellee S.C.R.A.P. commenced the instant action. The various legal proceedings that subsequently ensued are

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[10] See 346 F. Supp. 194.

detailed in this Court's earlier opinion in this case reported at 412 U.S. 669 (1973). Indeed, while this case was before this Court on the earlier appeal, the Commission also promised the Chief Justice that it was developing an impact statement under NEPA, and that same would be issued before the final rate decision in *Ex Parte 281* was announced—*but the Commission thereafter proceeded likewise to ignore and violate that further undertaking to this Court* (See 371 F. Supp. 1291, 1294). In fact, *no statement* was prepared for distribution to the parties *or for consideration by the Commission before the Commission issued its final report in Ex Parte 281 on October 4, 1972, in which it, approved the additional permanent rate increases for the transportation of recyclables requested by the railroads* (See 371 F. Supp. 1294).

Once again, without the preparation of a NEPA statement, the Commission arbitrarily concluded, in its final report of October 4, 1972, that the new approved % increases on recyclables "would not significantly affect the quality of the human environment" (See 371 F. Supp. 1294). The Commission thus asserted (See 371 F. Supp. 1294)—

> "there is thus no necessity for a formal impact statement."

The Commission's failure to prepare a NEPA statement provoked vehement protestations from the President's Council on Environmental Quality, the Environmental Protection Agency, and appellees (See 371 F. Supp. 1294). CEQ, in its letter to the Commission, felt that the Commission's action was totally "unresponsive to the language of our NEPA guidelines" (See 371 F. Supp. 1294, ftn. 8).

Appellee SCRAP thereupon filed a motion for injunctive relief against the Commission. On the same day, November 7, 1972, the Commission suddenly shifted its position, and suspended until June, 1973, the *already-approved* rate increases on recyclables (See 371 F. Supp. 1294). The Commission thereupon announced that it intended to conduct a *post-mortem* proceeding for the "limited purpose of further evaluating . . . the environmental effects of increased railroad freight rates and charges on . . . commodities being transported for the purpose of recycling" (See 371 F. Supp. 1294).

On March 5, 1973, 5 months after the Commission issued its final report of October 4, 1972 approving the new rate increase on recyclables, the Commission finally issued its *post-mortem* draft environmental impact statement now before the Court in this case.

Although numerous Executive agencies and departments, including EPA, CEQ, GSA, and the Departments of Commerce and Interior, filed extensive comments that were highly critical of the Commission's draft statement and the arbitrary conclusions therein contained, the Commission, on May 7, 1973, 7 months after it issued its final report of October 4, 1972 approving the new rate increase for recyclables, issued another *post-mortem* order which adopted the draft impact statement theretofore issued without substantial change (371 F. Supp. 1295).

Appellees thereupon filed motions for summary judgment in the pending court proceedings, which the district court granted on February 19, 1974. The court vacated the Commission's *post-mortem* order of May, 1973 which put the previously-approved

rate increases into effect, and it remanded the case to the Commission "*for fulfillment of its NEPA obligations*". The district court then proceeded to rule (371 F. Supp. 1293):

> "However, because of our uncertainty concerning the meaning of the Supreme Court's decision last term in *Atchison, Topeka & Santa Fe R. Co.* v. *Wichita Board of Trade*, 412 U.S. 800 (1973), we refrain from issuing an injunction restraining the railroads from collecting the increased rates pending the Commission's reconsideration."

Appellant railroads and the Government appealed. Injunctive relief having been completely denied, however, shippers of recyclable commodities have been forced to pay another $8 to 10 million a year since June, 1973 in new, arbitrary rate increases while this case has proceeded through the courts.

ARGUMENT

I.

This Court Lacks Jurisdiction Over Appellants' Direct Appeals Under 28 U.S.C. § 1253. The Appeals Should Therefore Be Dismissed.

Both Government appellants and railroad appellants rely exclusively on 28 U.S.C. § 1253 to support their direct appeals to this Court from the district court's judgment of February 19, 1974.[11] But, 28 U.S.C. § 1253 allows direct appeals to this Court *only* from judgments "*granting or denying . . . an interlocutory or permanent injunction*".

These two appeals, however, are *not* appeals "*from an order granting or denying . . . an . . . injunction*".

[11] See Government's brief, pg. 2; railroads' brief, pg. 2.

While the district court did deny an injunction which had been sought by appellees (371 F. Supp. 1307-10), *appellees have not perfected appeals from that denial.*

Appellants, on the other hand, having clearly prevailed on the injunction issue below so that the railroads are still collecting the new rate increase of $10 million a year authorized by the Commission, have no standing to appeal from that massive victory (*Public Service Commission of Missouri* v. *Brashear Freight Lines, Inc.*, 306 U.S. 204, 59 S. Ct. 480, 83 L.Ed. 608 (1939); *Gunn* v. *University Committee To End The War*, 399 U.S. 383, 391, 90 S. Ct. 2013 (1970); *Rockefeller* v. *Catholic Medical Center*, 397 U.S. 820, 90 S. Ct. 1517, 25 L. Ed. 2d 806 (1970). In this case, the district court expressly ruled (371 F. Supp. 1291, 1293):

> ". . . (W)e refrain from issuing an injunction restraining the railroads from collecting the increased rates pending the Commission's reconsideration."

Patently, therefore, both direct appeals to this Court must be dismissed for lack of jurisdiction under 28 U.S.C. § 1253 (*Public Service Commission* v. *Brashear Freight Lines, supra; Hutcherson* v. *Lehtin*, 399 U.S. 522, 90 S. Ct. 2238 (1969); *Mitchell* v. *Donovan*, 398 U.S. 427, 90 S. Ct. 1763, 26 L. Ed. 2d 378 (1970).

The two cases upon which appellants rely to support their jurisdictional claims are plainly inapposite because, contrary to the situation here, *both* involved appeals from orders *granting or denying an injunction. Baltimore & O. R.R.* v. *U.S.*, 386 U.S. 372 (1967) involved an appeal by losing parties who had sought an injunction which was denied by the court below. *United States* v. *Allegheny-Ludlum Steel Corp.*, 406 U.S. 742

(1972), in turn, involved two cases, one in which an appealing party requested injunctive relief that was denied, and the other in which the Interstate Commerce Commission opposed an injunction that had been granted by the district court.

Appellants have continuously contended that cases involving ICC actions should be placed in some sort of "special category", so that direct appeals to this Court should be allowed under 28 U.S.C. § 1253 even in cases where no injunctive relief is present. The short answer to that claim is found in the recent Report of the Study Group on the Caseload of the Supreme Court, which stated at 57 F.R.D. 573, 597 (1972):

> "Since many ICC cases are not of sufficient importance to require review by the Supreme Court, it is clear that the unique treatment of ICC orders is a burden on the Supreme Court that can no longer be justified."

Here, therefore, the direct appeals, which have no foundation whatsoever under 28 U.S.C. § 1253, should plainly be dismissed.

II.

The District Court Clearly Had Jurisdiction To Determine Whether the Commission Had Complied With the National Environmental Policy Act and To Grant Appropriate Relief When It Found the Commission Had Not.

Railroad appellants speciously argue that the district court lacked jurisdiction to determine whether the Interstate Commerce Commission properly complied with NEPA in *Ex Parte 281*. Government appellants seemingly do *not* join in that contention.

In any event, it is perfectly clear that the district court did possess the necessary jurisdiction. Indeed,

when this case was last here in 1973, this Court seemingly readily agreed that (93 S. Ct. 2420)—

> ". . . there is general judicial power to determine if an agency has complied with NEPA, and to grant equitable relief if it has not."

At that time, this Court appeared to cite with approval the earlier holdings of the Circuit Court of Appeals for the District of Columbia in *Calvert Cliffs' Coordinating Committee* v. *United States Atomic Energy Commission*, 146 U.S. App. D.C. 33, 449 F.2d 1109 and *Committee for Nuclear Responsibility, Inc.* v. *Seaborg*, 149 U.S. App. D.C. 380, 463 F.2d 783, wherein it was ruled that district courts have full jurisdiction to determine if federal agencies have complied with NEPA, and to grant effective relief when such compliance was either lacking or inadequate. In this regard, this Court stated, at 93 S. Ct. 2420:

> "Calvert Cliffs' held that a federal court had power to review rules promulgated by the Atomic Energy Commission, and there the court ordered further consideration of the rules on the ground there had not been compliance with NEPA. In *Committee for Nuclear Responsibility* it was held that federal courts had jurisdiction to consider whether an executive decision to conduct a nuclear test had satisfied the procedural requirements of NEPA . . ."

Moreover, there can be no question about the statutory jurisdiction of the district court to review orders of the Interstate Commerce Commission. 28 U.S.C. 1336 states:

> "Except as otherwise provided by Act of Congress, the district courts shall have jurisdiction of any civil action to enforce, enjoin, set aside, annul or suspend, in whole or in part, any order of the Interstate Commerce Commission."

Appellants, of course, have pointed to *no* Act of Congress which deprived the district court of jurisdiction in cases of this kind. On the contrary, through the National Environmental Policy Act, Congress has actually provided an additional, separate basis for such jurisdiction over cases of this nature (*Calvert Cliffs', supra; Committee for Nuclear Responsibility, supra; City of New York* v. *United States,* E.D. N.Y., 337 F. Supp. 150).

For these reasons, therefore, cases such as *Algoma Coal & Coke Co* v. *United States,* D.C. E.D. Va., 1935, 11 F. Supp. 487, *Koppers Co.* v. *United States,* D.C. W.D., Pa. 1955, 132 F. Supp. 159, *Alabama Power Co.* v. *United States,* D.C. D.C. 1969, 316 F. Supp. 337, affd. by divided court, 400 U.S. 73, and *Electronic Industries Assn.* v. *United States,* D.C. D.C. 1970, 310 F. Supp. 1286, affd. *per curiam,* 401 U.S. 967, upon which the railroads rely so heavily, are totally inapposite. None of those cases involved NEPA, or a complaint that the Commission had completely failed to comply with a *separate* federal statute (NEPA) in its proceedings under Section 15(7) of the Interstate Commerce Act.

III.

The Commission's Post-Mortem Environmental Impact Statement, Drafted for the First Time Five Months After the Commission's Final Report and Order of October 4, 1972 and Thereafter Issued in Final Form Seven Months After the Commission's Said Final Report and Order, Is Totally in Violation of NEPA and Is Thus Null and Void.

On October 4, 1972, after the conclusion of statutory hearings under the Interstate Commerce Act on April 20, 1972, the Commission issued its final statutory

report and order in *Ex Parte 281, Increased Freight Rates and Charges,* 1972, 341 I.C.C. 288. In that final report, the Commission stated (See 341 I.C.C. 314):

> "Inasmuch as we conclude that our actions herein will neither actually nor potentially significantly affect the quality of the human environment, we have not included in our report an extensive formal impact statement."

On November 7, 1972, after plaintiff S.C.R.A.P. moved for further injunctive relief in this action to prevent the rate increases thus authorized by the Commission from going into effect, the Commission suddenly reopened Ex Parte 281 to "evaluate the environmental effects of (these) increased rates and charges on the movements of commodities being transported for the purposes of recycling" (App. 91). No further hearings were thereafter held by the Commission. On March 5, 1973, approximately *five months after* the Commission issued its report and order of October 4, 1972 licensing permanent 1972 increases in rates for recyclables, the Commission finally issued a "draft impact statement." That "*post-mortem*" draft statement simply concluded (App. 92, 93):

> ". . . the selective freight rate increases (already) approved in this proceeding as to commodities moving for the purposes of recycling would not have a significant adverse impact upon the equality of the human environment. It was found that any environmental costs which may result from that action would be outweighed by the economic benefits derived by the railroads . . ."

Thereafter, on May 2, 1973, approximately *seven months after* the Commission's rate-increase report and order of October 4, 1972, the Commission prepared

and issued a Final Environmental Impact Statement, which the Commission itself described as follows (App. 89):

> "This report represents, in accordance with the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.*, our final statement as to the environmental effects of these increases in the railroad freight rates and charges on movements of commodities being transported for the purposes of recycling *found in our prior report and order (341 I.C.C. 288) to be just, reasonable, and otherwise lawful.*"

Once again, the commission concluded, in "*post-mortem*" fashion long after the issuance of its final report and order of October 4, 1972 (App. 236):

> "In conclusion, we do not believe that the action we take in this proceeding will have a significant adverse impact upon the quality of our human environment. Had we found, however, that our action would have some adverse effects upon the environment, it would not preclude our granting the relief sought by the respondent (railroads) to the extent permitted in this decision."

Based on this record, we respectfully submit that the Commission's said Environmental Impact Statement, drafted for the first time *five full months after the Commission's rate-increase report and order of October 4, 1972* and thereafter released in final form *seven full months after the said report and order,* was totally violative of NEPA and was thus null and void *ab initio* (*Calvert Cliffs Coordinating Committee et al* v. *United States Atomic Energy Commission,* 146 U.S. App. D.C. 33, 449 F.2d 1109 (1971); *Greene County Planning Board* v. *Federal Power Commission,* CCA

2, 1972, 455 F.2d 412, cert. denied, 93 S. Ct. 56 (1972); *Harlem Valley Transportation Association et al* v. *Stafford, Chairman, Interstate Commerce Commission,* CCA 2, 1974, 500 F.2d 328).

The rule to be applied here was succinctly summarized in a recent article entitled "*Mandate of the National Environmental Policy Act: The Preparation of Environmental Impact Statements*", written by an attorney from the Department of Justice and printed in The Journal of the Bar Association of the District of Columbia, Vol. 41, No. 1, January-June, 1974 issue, at page 30:

> "*Timing and Responsibility For The Preparation of Environmental Impact Statements*
>
> "*The time to prepare the statement*—NEPA states in Section 102(2)(c) that the environmental impact statement and the comments received shall accompany the proposal through 'the existing agency review processes.' The CEQ Guidelines (38 Fed. Reg. 20552, Sect. 1500.7(a)) state that 'draft statements on administrative actions should be prepared and circulated for comment *prior* to the *first significant point of decision* in the agency review process.' For the analysis presented in an environmental impact statement to be fully integrated into agency decision making, the NEPA process should be well underway *prior to the rendering of firm decisions by the agencies.*"
>
> (Italics supplied)

In *Greene County Planning Board* v. *Federal Power Commission, supra,* the Federal Power Commission argued it had no obligation to prepare an Environmental Impact Statement under NEPA "*until it files its final decision*" (See 455 F.2d 418, 419). The Second Circuit rejected *even* that contention, holding that

NEPA contains *a Congressional mandate to regulatory agencies such as FPC and ICC which requires that they carefully "consider environmental values 'at every distinctive and comprehensive state of the* [*agency's*] *process;'"* and *that they issue their own draft environmental impact statement in each case "prior to any formal hearings"* (See 455 F.2d 412, 419-20).

The Second Circuit meticulously explained in *Greene County* that "NEPA went far beyond the requirement that the agency *merely consider* environmental factors and include those factors in the record subject to review by the courts" (See 455 F.2d 412). Under NEPA, the court wrote, agencies such as FPC and ICC have the *"nondelegable responsibility" to prepare detailed environmental statements at the earliest possible stage of every environmentally-charged agency proceeding, and to consider the environmental values thus involved "at every distinctive and comprehensive stage of the agency's process"* (See 455 F.2d 420). In fact, the Second Circuit, in *Greene County* heavily relied on the prior decision of the District of Columbia Circuit in *Calvert Cliffs' Coordinating Committee* v. *Atomic Energy Commission, supra,* wherein it was stated, at pages 1117, 1118:

> "... NEPA was meant to do more than regulate the flow of papers in the federal bureaucracy. The word *"accompany"* in Section 102(2)(c) must not be read so narrowly as to make the Act ludicrous. It must, rather, be read to indicate a Congressional intent that environmental factors, as compiled in the *"detailed statement," be considered through agency review processes.*
>
> "Beyond Section 102(2)(c), NEPA requires that agencies consider the environmental impact of their actions "to the fullest extent possible."

> The Act is addressed to agencies as a whole, not only to their professional staffs. Compliance to the *"fullest"* possible extent would seem *to demand that environmental issues be considered at every important stage in the decision making process concerning a particular action—at every stage where an overall balancing of environmental factors is appropriate and where alterations might be made in the proposed action to minimize environmental costs."*
>
> (Italics supplied)

There can be no doubt, we submit, about the complete correctness of the Second Circuit's ruling in *Greene County* and the D. C. Circuit's holding in *Calvert Cliffs.* Both decisions do no more than fully sustain the statutory requirement of Section 102(2)(c) of NEPA (42 U.S.C. § 4322(2)(c)) which states:

> "Copies of such [environmental impact] statement and the comments and views of the appropriate Federal, State, and local agencies . . . *shall accompany the proposal through the existing agency review processes."*
>
> (Italics supplied)

The briefs filed by the railroads and the Government impliedly concede the correctness of this rule which has become so firmly established in the various circuits. However, they now belatedly contend that somehow the Commission, which arbitrarily failed and refused to have the necessary impact statement available at every meaningful stage of the agency proceeding, somehow nevertheless complied with NEPA by simply continuing to rule throughout that indeed no statement was required because its actions allegedly would have no significant impact on the environment. The utter fallaciousness of that position, however, is laid bare

by the Commission's own belated admission that it had not properly complied with NEPA *prior* to the rendition of its final decision of October 4, 1972, *and that accordingly it would have to spend seven months in the preparation of a post-mortem impact statement in an attempt to rationalize the final decision it had already issued.*

In conclusion, therefore, we urge the Court to hold—

(i) that the Commission violated NEPA when it failed to prepare or issue any impact statement to support the final decision it released on October 4, 1972 in Ex Parte 281, in which it approved another cumulative 5% rate increase for the transportation of recyclables, and that accordingly, the rate increase so licensed was unlawful; and

(ii) that the Commission further violated NEPA when it prepared for the first time, five months after its final order of October 4, 1972, a *post-mortem* NEPA statement, the only purpose of which was to try to rationalize the new rate increase on recyclables it had already approved in final form many months before.

IV.

The Commission's Final Environmental Impact Statement, Issued After the Commission's Order of Investigation of November 7, 1972, Without a Hearing and Without the Right of Confrontation, Is Unconstitutional and Violative of the Interstate Commerce Act, the Administrative Procedures Act and the CEQ Guidelines Under the National Environmental Policy Act.

On October 4, 1972, the Commission issued its final report and order in Ex Parte 281 without preparing or filing any environmental impact statement pursuant

to NEPA. Petitions vehemently protesting the Commission's conduct were thereupon filed by CEQ, EPA, appellees and other parties. On November 7, 1972, therefore, the Commission issued an Order of Investigation in Ex Parte 281, which read in part as follows:

> "*It is ordered,* That the above-entitled proceeding be, and it is hereby, reopened for the limited purpose of further evaluating, in accordance with the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*), the environmental effects of increased railroad freight rates and charges on the movements of commodities being transported for the purpose of recycling. . . .
>
> "*It is further ordered,* That in view of the foregoing actions, and because there is reason to believe that the tariff schedules identified in the appendix to this order may, if permitted to become effective, result in . . . rates and charges, rules, regulations, or practices which would not be in conformity with the report in *Ex Parte No. 281, Increased Freight Rates and Charges, 1972,* 341 I.C.C. 288, decided September 27, 1972, as modified by this order, *an investigation be, and it is hereby, instituted into and concerning the rates, charges, and regulations contained in said schedules, with a view to making such findings and orders as the facts and circumstances shall warrant. . . .*
>
> "*It is further ordered, That the investigation in this proceeding shall not be confined to the matters and issues hereinbefore stated as the reason for instituting this investigation, but may include all matters and issues with respect to the lawfulness of the said schedules under the Interstate Commerce Act. . . .*"
>
> (Italics supplied)

Plaintiffs and intervenor-plaintiffs thereupon requested that hearings be scheduled with reference to any and all matters within the scope of said investigation (App. 93). They also asserted the right to confront and cross-examine witnesses and Commission personnel who might participate in the Commission's fact-finding mission, especially those upon whose expertise the Commission would rely in the preparation of the belated environmental impact statement (App. 93). The Commission flatly refused to schedule any hearings, and it rejected the requests for confrontation and cross-examination, stating (App. 102):

> "We see no benefit to be derived by allowing further hearings in this proceeding. . . . The present environmental record has been developed in substantial part *by our own independent efforts* and there appears no reasonable basis for now concluding that the parties can make any further rational contribution to that record. . . .
>
> "The record in this proceeding is complete and further public procedures herein would be impracticable, unnecessary, and contrary to the public interest."
>
> (Italics supplied)

It is perfectly clear, of course, that the Commission's position in this regard was totally arbitrary and capricious. It had nowhere theretofore disclosed the so-called "environmental record" allegedly produced as a result of "its own independent efforts"—certainly, it had never confronted the parties with any such record for the purpose of cross-examination, refutation or rebuttal. It had not yet issued the draft environmental impact statement, later released in

March, 1973, and the Commission had theretofore steadfastly foreclosed presentation of the true environmental facts by simply concluding unilaterally that increased freights rates do not adversely affect either recycling or the human environment. Indeed, even in its final environmental impact statement of May 1, 1973, the Commission once again failed to make any findings regarding the last-mentioned crucial threshhold environmental issue, stating (App. 102):

> ". . . Chairman Russell B. Train of CEQ . . . has conveyed to us his belief that 'several rail haul cost biases currently exist', and certain of the parties herein aver that discriminatory railroad rates and charges impede the movement of waste materials and favor the transportation of primary materials with 'obvious' adverse consequences to the environment.
>
> "As recently as the last general rate proceeding, we pointed out that such a case does not provide an appropriate vehicle for examining these issues (*Increased Freight Rates, 1970 and 1971,* 339 I.C.C. 125, 189 (1971)). Thus, we do not attempt to determine whether the particular rates which result from the increases are maximum reasonable rates. . . ."

Appellees respectfully submit, therefore, that the Commission's refusal to schedule hearings with reference to all matters covered by its Order of Investigation of November 7, 1972 in Ex Parte 281 violated the parties' rights under the Due Process Clause of the Fifth Amendment and under the Interstate Commerce Act, the Administrative Procedure Act and the applicable Guidelines issued by CEQ under NEPA.

In *Goldberg* v. *Kelly*, 397 U.S. 254, 90 S.Ct. 1011 (1970), this Court extended "*rudimentary due process*" to cases involving the termination of federally-assisted welfare benefits on the basis of the following general rules which, we submit, should be equally applied in a case of this nature, where a federal agency is engaged in the licensing of millions of dollars in increased freight rates on recyclable commodities (at 397 U.S. 267-271):

> "'The fundamental requisite of due process of law is the opportunity to be heard.' *Grannis* v. *Ordean*, 234 U.S. 385, 394, 34 S.Ct. 779, 783, 58 L.Ed. 1363 (1914). 'The hearing must be at a meaningful time and in a meaningful manner.' *Armstrong* v. *Manzo*, 380 U.S. 545, 552, 85 S.Ct. 1187, 1191, 14 L. Ed. 2d 62 (1965). . . .
>
> "The opportunity to be heard must be tailored to the capacities and circumstances of those who are to be heard. It is not enough that a welfare recipient may present his position in writing. . . . Written submissions are an unrealistic option. . . . Moreover, written submissions do not afford the flexibility of oral presentations; they do not permit the recipient to mold his argument to the issues the decisionmaker appears to regard as important. . . .
>
> "*In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses.* . . .
>
> "Finally, the decisionmaker's conclusion . . . must rest *solely* on the legal rules *and evidence adduced at the hearing*. . . ." (Italics supplied)

As early as 1913, of course, this Court applied essentially the same rules of due process of law to rate

proceedings before the Interstate Commerce Commission, and that 1913 decision was relied on by Mr. Justice Brennan in the majority 1970 decision in *Goldberg* v. *Kelly, supra*. In that case, *Interstate Commerce Commission* v. *Louisville & Nashville Railroad*, 227 U.S. 88 (1913), the Commission contended that its decisions in rate cases were absolutely conclusive and could not be set aside even where the Commission's findings were wholly without substantial evidence to support them (See 227 U.S. 91). This Court unanimously rejected the Commission's position, stating, at pages 91, 92:

> "A finding without evidence is arbitrary and baseless. And if the Government's contention is correct, it would mean that the Commission had a power possessed by no other officer, administrative body or tribunal under our Government. It would mean that where rights depended upon facts, the Commission could disregard all rules of evidence, and capriciously make findings by administrative fiat. Such authority, however beneficently exercised in one case, could be injuriously exerted in another; is inconsistent with rational justice, and comes under the Constitution's condemnation of all arbitrary exercise of power.
>
> "In the comparatively few cases in which such questions have arisen it has been distinctly recognized that administrative orders, quasi-judicial in character, *are void if a hearing was denied; if that granted was inadequate or manifestly unfair;* if the finding was contrary to the 'indisputable character of the evidence' . . . ."
>
> ". . . A finding without evidence is beyond the power of the Commission. An order based thereon is contrary to law and must, in the language of the statute 'be set aside by a court of competent jurisdiction' . . . ." (Italics supplied)

In *Louisville & Nashville R.R., supra,* this Court, in a further holding particularly relevant to the case at bar, went on to state, at pages 93, 94:

> "The Government further insists that the Commerce Act . . . requires the Commission to obtain information necessary to enable it to perform the duties and carry out the objects for which it was created, and having been given legislative power to make rates it can act, as could Congress, on such information, and therefore its findings must be presumed to have been supported by such information, *even though not formally proved at a hearing. But such a construction would nullify the right to a hearing—for manifestly there is no hearing when the party does not know what evidence is offered or considered and is not given an opportunity to test, explain or refute. . . . All parties must be fully apprised of the evidence submitted or to be considered, and must be given opportunity to cross-examine witnesses, to inspect documents and to offer evidence in explanation or rebuttal.* In no other way can a party maintain its rights or make its defense. In no other way can it test the sufficiency of the facts to support the finding; for otherwise, even though it appeared that the order was without evidence the manifest deficiency could always be explained on the theory that the Commission had before it extraneous, unknown but presumptively sufficient information to support the finding." (Italics supplied)

Clearly, therefore, these long standing rules of constitutional law, directly applicable to rate proceedings before the Commission, explain why the Second Circuit, in *Greene County Planning Board* v. *Federal Power Commission, supra,* ruled, in 1972, that federal regulatory agencies such as FPC and ICC *must issue their draft environmental impact statements under*

NEPA "prior to any formal hearings" (See 455 F.2d 419).

These same rules of constitutional law directly applicable to proceedings before the Commission also undoubtedly explain why the Interstate Commerce Commission itself felt constrained to schedule *"further hearings"* in *City of New York* v. *United States,* U.S.D.C. E.D.N.Y., 1972, 344 F. Supp. 929, when the district court in New York rejected the Commission's earlier order approving the abandonment of railroad facilities pending full compliance by the Commission with NEPA. Under obvious scrutiny of the district court in New York, the Commission let all interested parties participate fully in these "further hearings" which dealt with the "environmental questions" there raised under NEPA (See 344 F. Supp. 931). Totally unlike its arbitrary, capricious hearing denial in the case at bar, the Commission proceeded as follows in *City of New York, supra,* (See 344 F. Supp. 936-939):

> "Together with its order directing *further hearings* following remand, the Commission issued a draft environmental impact statement to provide a basis for exploration of the Railroad's abandonment at the hearing. . . .
>
> "Although not compelled to do so by the terms of our remand, see 337 F. Supp. at 164, the Commission held five days of hearings, a substantial portion of which were focused on the environmental questions. All parties were given full opportunity to present evidence on the environmental aspects of the case. . . .
>
> "This procedure was consonant with that mandated in *Greene County Planning Bd.* v. *FPC, supra,* 455 F.2d at 422, *where the Second Circuit*

held that the FPC violated "NEPA by conducting hearings prior to preparation by its staff of its own impact statemnt." (Italics supplied)

Clearly, therefore, the Commission's refusal to hold hearings in the case at bar after issuance of its Order of Investigation on November 7, 1972 violated appellees' rights under the Fifth Amendment; and the Commission's failure to hold any hearings whatsoever after issuance of its draft environmental impact statement on March 5, 1973, violated NEPA, as construed by the Second Circuit in *Greene County, supra*—a case wherein this Court denied certiorari.

Moreover, the Commission's procedures in this case were simultaneously violative of the Interstate Commerce Act (Title 49 U.S.C. § 15(7)), the Administrative Procedure Act (Title 5 U.S.C. §§ 554-556), and the Guidelines issued by the President's Council on Environmental Quality pursuant to NEPA (40 C.F.R. § 1500.7(d), effective 1/28/73, 40 C.F.R. 1500.14). The Commerce Act (49 U.S.C. § 15(7)) plainly requires a "*full hearing*" in all rate cases of this nature after the Commission decides to investigate "the lawfulness of such rate." Indeed, in *Atchison, Topeka & Santa Fe Railway Co.* v. *United States*, 284 U.S. 248, 262 (1932), a case like the instant action involving a reopened rate proceeding, this Court ruled that the Commerce Act requires the Commission to hold a full, fair hearing, even in *reopened rate proceedings* under the Act, whenever such a hearing "is required by the essential demands of justice." The Court admonished the Commission (284 U.S. 262):

> "In the discharge of its duty, a fair hearing is a fundamental requirement. . . . In the instant proceeding, the [original] hearing accorded related to conditions which had been radically changed, and a hearing [in the reopened proceeding] . . . would have permitted the presentation of evidence relating to existing conditions, was denied. *We think this action was not within the permitted range of the Commission's discretion, but was a denial of rights.* The order of the Commission which was thus made effective, and the ensuing supplemental order, cannot be sustained."

In the case at bar, the Commission's November 7, 1972 Order of Investigation reopened Ex Parte 281 for

> "(i) the purpose of re-evaluating the environmental effects under NEPA of the increased freight rates ordered by the Commission's report of September 27, 1972, and
>
> (ii) the purpose of investigating any and all other matters and issues with respect to the *lawfulness* of the . . . schedules under the Interstate Commerce Act."

Ergo, appellees were patently entitled to the hearing they demanded in the said reopened investigation under *both* NEPA *and* the Commerce Act itself, and the Commission violated the latter as well as the former when it flatly denied that right.

The same conclusion is equally compelling under the Administrative Procedure Act (5 U.S.C. §§ 554-556) and the CEQ Guidelines under NEPA. Under 5 U.S.C. § 554(a), (c) hearings must be granted, in accordance with 5 U.S.C. §§ 556 and 557, "in every case of adjudication required by statute to be determined on the record after opportunity for agency hearing." Here, a hearing is required by the Commerce Act, so 5 U.S.C.

554-556 are entirely apposite to the case at bar. Under 5 U.S.C. § 556, it is provided:

> "A party is entitled to present his case . . . by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts."

Finally, under 5 U.S.C. § 556(e), it is provided:

> "The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, constitutes the *exclusive record for decision . . . When an agency decision rests on official notice of a material fact not appearing in the evidence in the record, a party is entitled, on timely request, to an opportunity to show the contrary.*" (Italics supplied)

All of these rights and protections were denied appellees in this case when the Commission arbitrarily and unlawfully refused to conduct any hearings after it reopened Ex Parte 281 in November, 1972 and scheduled a further investigation, under both the Commerce Act and NEPA. In *Northeast Airlines, Inc.* v. *Civil Aeronautics Board,* CCA 5, 1965, 345 F.2d 484, cert. denied 382 U.S. 845, 86 S.Ct. 41 (1966), a case wherein the CAB reopened a case theretofore heard by the Board, CAB elected to rely exclusively on its own data and statistics and it denied Northeast Airlines' demand for a hearing under the Administrative Procedure Act. The Fifth Circuit rejected the Board's procedure, stating at 345 F.2d 487:

> "Having opened the door to new data, the Board was obliged to take a full look. No useful purpose would be served in our discussing each aspect, but we suggest that fairness may require that Northeast's opportunity to rebut and explain what the Board has already noticed should extend to as recent developments as may be available at the date of the hearing. . . ."

In conclusion, the Court's attention is directed to the Guidelines under NEPA published by CEQ and made effective and applicable "to all draft and final impact statements filed with the Council after January 28, 1973." These guidelines state, at 40 C.F.R. 1500.7(d):

> "Agency procedures developed pursuant to § 1500.3(a) of these guidelines should indicate as explicitly as possible those types of agency decisions or actions which utilize *hearings* as part of the normal agency review process, either as a result of statutory requirement or agency practice. *To the fullest extent possible, all such hearings shall include consideration of the environmental aspects of the proposed action.* Agency procedures shall also specifically include provision for public hearings on major actions with environmental impact. . . . In deciding whether a public hearing is appropriate, an agency should consider . . . the degree of interest in the proposal, as evidenced by requests from the public and from Federal . . . authorities that a hearing be held . . . *Agencies should make any draft environmental statements to be issued available to the public at least fifteen (15) days prior to the time of such hearings.*" (Italics added)

A fortiori, the Commission's final environmental impact statement of May 2, 1973 in Ex Parte 281 is unconstitutional, completely unlawful and it must therefore be rejected by this Court (See *Atchison, Topeka & Santa Fe Railway Co.* v. *Wichita Board of Trade,* 93 S.Ct. 2367, 2374 wherein this Court recently reaffirmed the rule that decisions of the Commission in

rate cases may be rejected by the courts "upon a showing that they . . . were made without a hearing, exceed constitutional limits, or for some reason amount to abuse of power").

V.

The Commission Has Constantly Exhibited Hostility and Contempt for the Requirements of NEPA, Both in This Case and in Other Statutory Proceedings. Accordingly, the District Court Properly Exercised Its Judicial Power to Review Not Only the Form of the Commission's Belated Asserted Compliance With NEPA in This Case, but the Substance as Well.

The Commission, over the years since 1970 when NEPA became effective, has exhibited almost complete disdain and contempt for the requirements of that federal statute. As early as 1971, it sought to intervene in *Greene County Board* v. *Federal Power Commission, supra,* in support of the Federal Power Commission's attempt to avoid regulatory agency compliance with NEPA. ICC's intervention was rejected; the Second Circuit overruled FPC's position, and this Court denied certiorari.

In *City of New York* v. *United States, supra,* a 1972 case involving proceedings before the Commission itself, ICC directly defied NEPA and endeavored to license the abandonment of railroad facilities without the preparation of a supporting impact statement. A three-judge court in New York criticized the Commission for its "slow reaction" to NEPA, and stated the Commission is powerless to "disregard . . . the law" (337 F. Supp. 158-160). The Court remanded the case to the Commission, stating, at 337 F. Supp. 160:

> "To permit an agency to ignore its duties under NEPA with impunity because we have serious doubts that its ultimate decision will be affected by compliance would subvert the very purpose of the Act and encourage further administrative laxity in this area . . . . In any event, preservation of the integrity of NEPA necessitates that the Commission be required to follow the steps set forth in § 102, even if it seems likely that these steps will lead it to adhere to the present result. Thus, this proceeding must be remanded to the Commission for it to bring itself into compliance with the law."

Albeit the decision in *City of New York, supra,* was rendered on January 20, 1972, the Commission nevertheless proceeded just 12 days later (on February 1, 1972) in this case to license another increase in rates for the transportation of recyclables *without preparing any impact statement under NEPA*. The Commission instead arbitrarily continued to rely on the same type of terse, unsupported conclusion it espoused in *City of New York,* to wit, that, in its opinion, the approved new increase "would have no significant effect . . . . on the quality of the human environment within the meaning of NEPA" (See 341 I.C.C. 288, 314).

The Commission's continued defiance of the law in Ex Parte 281 thus led to the commencement of this action, and although the Commission promised both the district court and the Chief Justice of this Court that it would fully comply with all of the requirements of NEPA *before* it issued its final report in this case, the record shows that once again, the Commission rendered that report on October 4, 1972 without preparing a final impact statement under NEPA.

In the meantime, in still another case simultaneously pending in New York, the Commission, *contrary to the*

position taken by the Department of Justice in the same case, contended that it had no obligation even to prepare a NEPA impact statement until it was ready to reach its final decision in a case—i.e. ICC argued it had no duty to prepare its statement at any earlier stage of the proceedings (See *Harlem Valley Transportation Association* v. *Stafford, Chairman, ICC,* 500 F.2d 328 (1974). That contention was bluntly rejected by the courts in New York, and the Second Circuit stated:

> ". . . . (W)hile we recognize there are limits to what may reasonably be expected from an agency, we cannot excuse noncompliance with NEPA such as the ICC here seeks to justify."

Ergo, it is plain, we submit, in light of this record which demonstrates constant hostility and contempt on the part of the Commission for the requirements of NEPA, both in this case and in all others recently before the courts, that the district court clearly had the power and duty to review not only the *form* of the Commission's alleged belated compliance with NEPA in the case at bar, but the *substance* of that compliance as well.

In this regard, the courts have held that federal agencies must at least make a *good faith* effort to comply with NEPA (*Environmental Defense Fund* v. *Corps of Engineers,* E.D. Arb., 1972, 342 F. Supp. 1211, 1214). NEPA does not permit impact statements to be slanted or biased and it utterly precludes those which amount to mere *pro forma* rituals, since clearly such statements negate the requirement of good faith (*Environmental Defense Fund, Inc.* v. *Corps of Engineers, supra,* at pg. 1214; *Calvert Cliffs Coordinating Committee* v. *Atomic Energy Commission, supra,* at pgs.

1114, 1117, 1128). Indeed, when an impact statement falls into one of the last mentioned categories, it must be rejected by the courts because of NEPA's insistence "upon unbiased and open-minded evaluations in spite of the Agency's contradictory roles" (*District of Columbia* v. *Volpe,* 3 E.R.C. 1143 (D.C. Cir., 1971); *Sierra Club* v. *Froehlke,* D.C. Wis., 1972, 345 F. Supp. 440, 445).

Here, it is plain, we submit, that the *post-mortem* Environmental Impact Statement released by the Commission 7 months after the rendition of its final report in *Ex Parte 281* was *not* "a good faith effort to comply with NEPA." Rather, it was a mere *pro-forma* ritual, the sole purpose of which was to rationalize the Commission's earlier conclusion that the rates for transportation of recyclables should suffer still another % increase and that such action, blindly taken exclusively with the interests of the railroads in mind, allegedly would not (in the Commission's judgment) adversely affect the environment. Any doubt about the absolute validity of this assessment is dispelled by the following comments filed by other Federal Government agencies regarding the Commission's post-mortem production:

> (i) *U.S. Department of Commerce*— " . . . the draft impact statement was written to support the *prior* conclusions of (the) Commission and *not* to inform the public" (App. 100).
>
> (ii) *General Services Administration*— "GSA does not believe recyclables should be required to bear their full share of the carriers' revenue requirements. It suggests that where it can be determined that reduced rail freight levels might reasonably be expected to result in increased recycling of solid wastes, serious consideration should be given to the establishment of rate ceil-

ings on such traffic no lower than the compensatory level" (App. 271).

(iii) *U.S. Department of Interior*— " . . . the involved statement does not provide a careful multi-disciplinary examination of the environmental effect" (App. 274).

(iv) *Environmental Protection Agency*—"EPA has classified the draft environmental impact statement as *Category 3—Inadequate*. . . . (T)he statement does not adequately assess the environmental impact of the proposed freight rate increases on the movement of secondary materials; and . . . it does not consider in reasonable detail the range of alternatives to the proposed action" (App. 275).

(v) *President's Council on Environmental Quality*—" . . . (T)he draft statement fails to consider how freight rates affect longrun decisions on investment in scrap-intensive production facilities . . . *and it finds it difficult to believe that the economic well-being of the Nation's railroads is at stake in this proceeding.* CEQ does not understand why the Commission cannot design incentive rates for recycling."

Moreover, the record before the Court demonstrates *that two members of ICC itself* dissented from the Commission's order which approved the *post-mortem* impact statement, and *both* suggested *that a moratorium should be placed on any further rate increases for recyclables until the Commission comes to grips with the basic rate disparities which grow wider with each % increase in the rates* (App. 237, 238).

Based on this record, we respectfully submit it was absolutely incumbent upon the district court to review not only the *form*, but also the *substance* of the Commission's *post-mortem* alleged compliance with NEPA

in this case. And, upon such review in this case, we submit further that it was wholly correct and proper for the court to find—

(1) "The Commission's mode of preparation and utilization of the challenged impact statement here violated both Section 102(2)(C)'s fundamental purpose and . . . specific command" (371 F. Supp. 1299).

(2) "The Commission . . . neither intended to give nor actually gave full reconsideration to the question of the recyclable rate increase" (371 F. Supp. 1299).

(3) "[The Commission's statement] makes no attempt to integrate the considerations of national transportation policy justifying the rate increase with the environmental considerations analyzed in the impact statement" (371 F. Supp. 1299).

(4) "[The Commission] refused to hold . . . a hearing to reconsider the increase on recyclables. . . ." (371 F. Supp. 1300).

(5) ". . . a reader of the statement must be struck by the combative, defensive and advocatory language and style in which it is written" (371 F Supp. 1302).

(6) "We find the Commission's failure to alter its draft impact statement in response to *three* of the critical comments *of other federal agencies* particularly troublesome" (371 F. Supp. 1302).

(7) ". . . (T)he draft statement's . . . most fundamental and important deficiency (is) the limitation of its analysis *to the marginal impact of the most recent rate increase with no discussion of whether the underlying rate structure itself significantly affects the environment*" (371 F. Supp. 1303, 1304).

Considering the aforementioned fact that constant annual % rate increases in the last few years have seriously aggravated the *nationwide average disparities* in freight rates for the transportation of competing recyclables and virgin natural resources—to wit,

> (a) in the case of wastepaper and pulp, from 13.9¢ per cwt. in 1959 to 28¢ per cwt. in 1975 in favor of pulp, and
>
> (b) in the case of non-ferrous metal ores and scrap, from 13.3¢ per cwt. in 1959 to 24¢ per cwt. in favor of the virgin ores—

it was likewise perfectly correct and proper for the district court to hold, at 371 F. Supp. 1304:

> "We fail to understand how any consideration of the environmental impact of approving the recyclable rate increases could be full without an analysis of how the underlying rate structure itself affects the environment. *It is the underlying rate structure which the percentage increases aggravate; if this structure contributes to the degradation of our environment, then the increases would at least presumptively aggravate that contribution.* . . . Any impact on the underlying structure could be eliminated by holding down recyclable rate increases each time the railroads requested a general rate increase. The Commission's failure to hold down the rate increases on recyclables would thus have a cumulative impact on the environment." (Italics supplied.)

These findings by the court are in full accord with the position taken by 5 federal agencies in this case and by 2 of the ICC Commissioners. They are likewise fully responsive to the constant positions taken in recent years by the League of Cities-U.S. Conference of Mayors, Council of State Governments, National Commission on Materials Policy, and the President's Citizens Advisory Committee on Environmental Quality, all of which are a matter of record in this case.

Ergo, the district court's decision, based on voluminous supporting evidence before the Court, should plainly be affirmed.

VI.

The Nation's Urgent Interests in Resource Conservation, Resource Recovery, Restriction of Unnecessary Foreign Imports of Critical Materials and Energy Conservation Will All Be Seriously Damaged If This Court Is Misled by Some of the False Assertions Presently Advanced by Appellants in This Case.

Before concluding, NARI feels constrained to direct the Court's attention to some of the inaccurate, baseless contentions advanced by appellants in this case, not only because they threaten a fair and just decision in the instant action, but also because, if believed, they could result in serious adverse impacts on our nation's vital, urgent interests in resource conservation, recycling, restriction of unnecessary foreign imports of critical raw materials and energy conservation.

(1) THE COMMISSION'S ASSERTION THAT THE BASIC RATE STRUCTURE FOR RECYCLABLE COMMODITIES IS THE SUBJECT OF INVESTIGATION IN EX PARTE 270.

Throughout its brief, the Government attempts to claim that *Ex Parte 270,* a long, malingering study ICC has been conducting off and on for the past 4 years and which will apparently continue for another 4, is the proper place for an examination of the basic rate structure for recyclables (Govt's brief, pgs. 16, 17; 41). The record before the Court, however, demonstrates that when NARI applied to Commissioner Hardin, the ICC

Commissioner-in-Charge of *Ex Parte 270* on November 7, 1973 for assurance that the basic rate structure for recyclable wastepaper, textiles and non-ferrous scrap would be included in the *Ex Parte 270* rate investigation proceedings (See *Appendix A* hereto), Commissioner Hardin refused to include those commodities in the *Ex Parte 270* investigation proceedings because allegedly the Commission's "investigative abilities are limited in terms of money and manpower." Commissioner Hardin went on to state (*Appendix B* hereto):

> "With respect to your . . . suggestion that a(n) . . . investigation be instituted with respect to nonferrous metal scrap, wastepaper, and the virgin competitive products, . . . I am not in a position to advise . . . when and if such an investigation will be instituted. . . .
>
> "Rather than await an initiating response from the Commission, . . . I suggest that you meet with the railroad industry in order to determine whether or not it is possible to agree upon a relevant data base and limit the areas of controversy. . . ."

As of this date, the Commission has *not* embarked upon any investigation of the rate structure for these basic recyclable solid waste materials, and thus it is absolutely misleading for the Government to take the position it has regarding *Ex Parte 270* in its brief.

(2) THE GOVERNMENT'S ASSERTION THAT CONSTANT RATE INCREASES FOR RECYCLABLES ARE NECESSARY BECAUSE THE RAILROADS ARE IN DESPERATE FINANCIAL CONDITION.

The Court certainly knows that fortunately only some of the nation's railroads have been mismanaged to the point of financial embarrassment. Railroads such

as the Southern System, the Burlington Northern, the Southern Pacific, the Union Pacific, the Chessie System and others are operating with handsome profits.

Moreover, in each of the general revenue proceedings in recent years, the railroads themselves have either totally or partially exempted long lists of commodities, including some virgin commodities such as pulp which competes with waste-paper, from the requested rate increases.

The point, therefore, is that the rate increases sought on recyclables are not essential to the continued operation of the railroads, and it is exceedingly unreasonable and damaging for the railroads constantly to aggravate the existing rate disparities against recyclables by increasing the rates for those commodities, while exempting scores of other commodities for reasons known only to the railroads themselves.

Finally, the Commission itself recently received extensive evidence in *Ex Parte 310 — Nationwide Freight Rate Increases, 1975,* which demonstrates, as the Commission's records already reflected, that typically, *virgin commodities are traveling on the nation's railroads at rates far below the railroads' variable costs, while recyclable commodities are concomitantly compelled to pay rates that far exceed the railroads' costs.* How, therefore, could the Commission possibly justify any further increases in transportation rates for recyclables when virgin commodities are carried at rates substantially below the railroads' costs?

And, how can the railroads justly demand further increases for the carriage of recyclables when daily they transport long lists of other commodities at rates which do not even defray their own costs?

CONCLUSION

The two appeals should be dismissed for lack of jurisdiction. If the Court reaches the merits, the district court's judgment should be affirmed, or in the alternative, this Court should rule that the 1972 rate increases on recyclables, approved by the Commission's order issued on October 4, 1972, without the preparation of any impact statement under NEPA, are unlawful; and the Commission's *post-mortem attempt* to legalize those unlawful rate increases is unsustainable.

Respectfully submitted:

EDWARD L. MERRIGAN
Attorney for Appellees
NARI et al.
888 17th Street, N. W.
Washington, D. C. 20006

APPENDIX A

SMATHERS AND MERRIGAN
ATTORNEYS AND COUNSELLORS AT LAW
888 SEVENTEENTH STREET, N.W.
WASHINGTON, D.C. 20006

November 7, 1973

Honorable Dale W. Hardin
Commissioner
Interstate Commerce Commission
Washington, D. C. 20423

Re: Ex Parte No. 270, Investigation of Railroad Freight Rate Structure

Dear Commissioner Hardin:

Thank you for your very nice letter of October 23, 1973 and for the information furnished therewith.

Considering the serious problems confronting the Commission, the recycling industry throughout the United States and, of course, the railroads as a result of the continuing litigation in *Ex Parte No. 281—Increased Freight Rates, 1972 (S.C.R.A.P.* v. *United States,* et al), we find it exceedingly difficult to understand why your investigations announced to date do not include *non-ferrous metal scrap* and its competing virgin commodities as well as just iron ores and scrap iron and steel, and why they do not include wastepaper and competing wood pulp shipments instead of just lumber and lumber products.

While we understand the Commission's assertion that its investigative abilities are limited in terms of money and manpower, certainly these additional recyclable commodities (non-ferrous metal scrap and wastepaper) should fairly be added to and considered as part of *Ex Parte No. 270 (Sub-No. 5), Ex Parte No. 270 (Sub-No. 6),* and *Ex Parte No. 270 (Sub-No. 7),* especially in light of the long malingering litigation problem hereinabove referred to.

Accordingly, we urge you to take whatever actions are necessary—

(1) To add non-ferrous metal scrap to *Ex Parte No. 270 (Sub-No. 6)* and the competing virgin metal natural resource commodities to *Ex Parte No. 270 (Sub-No. 7)*, along with wood pulp, which is certainly one of our most important timber products, or in the alternative

(3) To commence at the earliest possible date additional *Ex Parte No. 270* investigations to cover the aforementioned recyclable commodities so heavily involved in the basic rate discrimination questions raised in *Ex Parte No. 281* and the related litigation.

Obviously, NASMI's committee is ready and anxious to meet with both you and Mr. Goodman. However, certainly the first step must be taken by the Commission, to wit, the commencement of active investigations regarding all of the important recyclable commodities—not just one of them. In fact, NASMI is principally concerned with all recyclable commodities other than scrap iron and steel—and those it represents (non-ferrous metal scrap, wastepaper, textiles, plastics) are the ones which create the biggest and most troublesome solid waste disposal problems for our federal, state and local governments. Accordingly, it is these which should clearly have some fair preference in the current freight rate investigation. Indeed, these are the recyclable commodities the Federal Maritime Commission selected for first order of investigation (see *Docket 72-35, FMC Investigation of Freight Rates Charged for Transportation of Wood Pulp and Wastepaper).*

Looking forward to your advice in this regard, I am,

Sincerely,

EDWARD L. MERRIGAN

ELM:gk
cc: Leonard S. Goodman, Esq.

APPENDIX B

INTERSTATE COMMERCE COMMISSION
WASHINGTON, D. C. 20423

November 13, 1973

Mr. Edward L. Merrigan
Counsel, National Association of
Secondary Material Industries, Inc.
Smathers and Merrigan
888 Seventeenth Street, N.W.
Washington, D. C. 20006

Dear Mr. Merrigan:

In the Coordinator's report, served October 10, 1973, *Investigation of Railroad Freight Rate Structure*, 345 I.C.C. 1, 2, after announcing that five subumbered investigations were being instituted, I stated that, "While shippers of various commodities may believe that the Coordinator should immediately institute investigations into the aspects of the railroad freight rate structure of critical concern to them, they must remember that the resources in terms of money and manpower of the railroads, the Special Projects Counsel, and the Commission are not unlimited." I therefore can understand your concern that investigations were not instituted with respect to non-ferrous metal scrap and wastepaper. Further, I appreciate your awareness that the Commission's "investigative abilities are limited in terms of money and manpower."

Although I am also well aware of the long "malingering" litigation problem surrounding the Commission's decision in Ex Parte No. 281, cited in your letter of November 7, 1973, I am unable to agree with your proposal to expand the ex parte subnumbered investigations, Sub-No. 5, Sub-No. 6, and Sub-No. 7. With respect to your alternate suggestion that a subnumbered investigation be instituted with respect to non-ferrous metal scrap, waste-paper,

and the virgin competitive products, obviously I am not in a position to advise you by letter when and if such an investigation will be instituted. You and all interested parties will be advised of developments in Ex Parte No. 270 by order, notice, or other appropriate means.

Rather than await an initiating response from the Commission, I renew my suggestion of October 23, 1973, that you meet with the Special Projects Counsel. I would suggest that you also meet with the railroad industry in order to determine whether or not it is possible to agree upon a relevant data base and limit areas of controversy. I can assure you that such efforts, if successful, will in the long run prove to be useful in the Commission's continuing study of the railroad rate structure.

For the convenience of all, I am arranging to have a copy of this letter and our previous correspondence included in the correspondence section of the basic Ex Parte No. 270 docket.

Sincerely,

/s/ DALE W. HARDIN
Dale W. Hardin
Commissioner

CC: Leonard S. Goodman